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Supreme Court of the United States

October Term, 1941

No. 400

CITY OF MORTON, ILLINOIS, a Municipal Corporation, et al.,

Petitioners,

vs.

BEN RANDOLPH, *as Receiver of the* CITY NATIONAL BANK OF MORTON, ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE ON BEHALF OF THE PEOPLE OF THE PHILIPPINE ISLANDS

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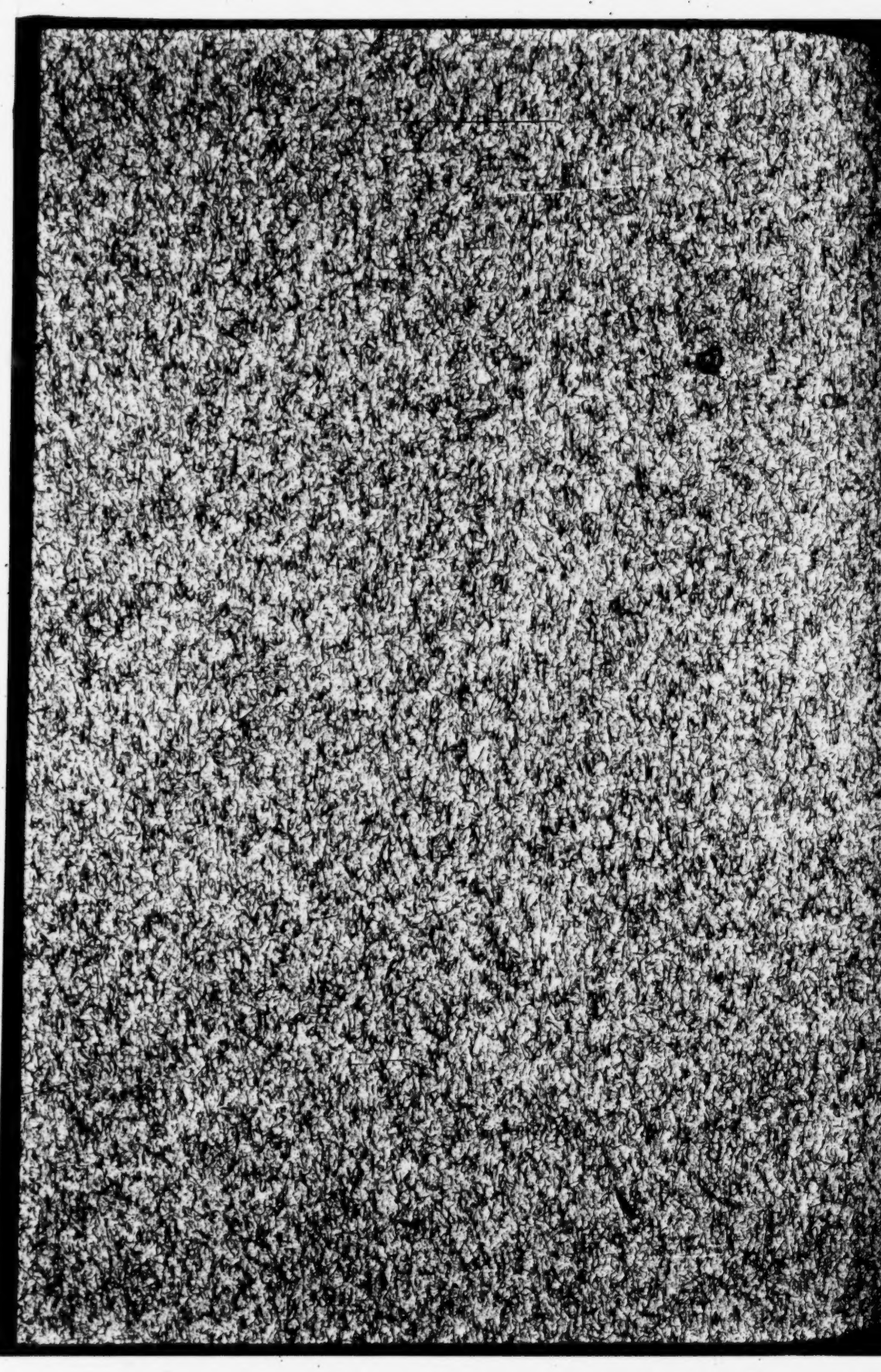

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Supreme Court of the United States

OCTOBER TERM, 1933

No. 400

CITY OF MARION, ILLINOIS, *a Municipal Corporation, et al,*
Petitioners,

vs.

BEN SNEEDEN *as Receiver of the* CITY NATIONAL BANK OF HERRIN, ILLINOIS,
Respondent.

BRIEF OF AMICI CURIAE ON BEHALF OF THE PEOPLE OF THE PHILIPPINE ISLANDS

INTRODUCTION

The undersigned, William Cattron Rigby and Fred W. Llewellyn, attorneys for the People of the Philippine Islands, being thereunto duly authorized and instructed by direction of the Governor-General of the Philippine Islands, appear herein as *amici curiae*, and present this brief on behalf of the People of the Philippine Islands.

The parties of record on both sides have consented to such appearance, the petitioners, through their counsel verbally, and the respondent, through the Comptroller of the Currency of the United States, as evidenced by a letter from the latter to the Secretary of War, dated August 21, 1933, a copy of which is hereunto appended (Appendix I, *infra*, pp. 9-10).

PURPOSE OF THIS BRIEF

This brief is presented to show more fully the far reaching importance of the basic question presented, especially to the

People of the Philippine Islands, and to bring to the attention of this Court important reasons, in addition to those urged by the petitioners, for the granting of the writ and for the reversal of the judgment of the Circuit Court of Appeals for the Seventh Circuit. More specifically this brief is submitted because:

(1) This cause presents the question whether state and national banks, empowered by law to receive deposits and to do a general banking business, have implied power to pledge their assets to secure deposits of public funds;

(2) The People of the Philippine Islands, always understanding that such banks had such power, has for more than twenty years maintained large amounts of its public funds on deposit in national and state banks within the continental United States, each deposit secured by pledge of equivalent collateral, and such deposits and pledges now aggregate approximately $63,000,000, distributed among 34 national and 13 state banks;

(3) The opinion and judgment of the United States Circuit Court of Appeals in this cause, holding in substance that state and national banks in Illinois are without such power, is, for the reasons set forth below, as well as those presented in the petition and supporting brief already on file, clearly erroneous, and tends to establish an important judicial precedent, which, if undisturbed, will erroneously and unjustly prejudice the interests of the People of the Philippine Islands, by casting serious doubt upon the validity of the pledges by which its deposits above mentioned are secured, thus wrongly jeopardizing the security of those deposits; and

(4) The Federal and insular statutes authorizing, and circumstances surrounding, the adoption and maintenance by the People of the Philippine Islands, of the practice of requiring this form of security for deposits of its public funds in state and national banks of the United States, more fully set forth below, disclose a long-standing tacit recognition by the Congress of the existence of the questioned power, and

constitute substantial grounds, in addition to those urged in the petition and brief heretofore filed herein, for the granting of the writ, and for reversal by this Court of the judgment of the Circuit Court of Appeals in this cause.

STATEMENT

The Philippine Islands comprise a self-governing territorial possession and dependency of the United States, with a population of about 12,000,000 people, whose insular government was established and is maintained under and pursuant to certain organic statutes enacted by the Congress of the United States, of which those still in force are compiled in the United States Code and its supplements as Chapter 5 of Title 48.

Under the said organic statutes the insular government of the Philippine Islands is authorized to issue and has issued negotiable bonds and notes, and is authorized to have and maintain and does have and maintain a separate local system of coinage and currency for the use and benefit of the inhabitants of those Islands; and is further authorized to adopt such measures as it may deem proper not inconsistent with said organic statutes to maintain the parity of value of the said bonds, notes, coinage and currency (48 USC 1141-1156).

By the Act of Congress approved July 1, 1902 (32 Stat. 691), establishing a civil government for the Philippine Islands, the legislative power of that government was vested in the Philippine Commission, which later, under other Acts, including the Act of Congress approved August 29, 1916 (39 Stat. 545), was succeeded by the Philippine Legislature. By Section 86 of the said Act of July 1, 1902 (32 Stat. 712), it was provided that:

> All laws passed by the government of the Philippine Islands shall be reported to Congress, which hereby reserves the power and authority to annul the same.

A similar provision with respect to laws passed by the Philippine Legislature was carried by the said Act of Aug-

ust 29, 1916, in Section 19 thereof (39 Stat. 551), the latter provision being still in effect (48 USC 1054), and the Act last mentioned also contained provision continuing in effect the laws in force in the Philippines to the date of its enactment, except as altered, amended or modified by that Act, until altered, amended or repealed by the Congress or the Philippine Legislature (39 Stat. 547; 48 USC 1004).

Meanwhile, the Philippine Commission, on October 12, 1907, enacted its Act No. 1792, of which Section 38 (Sec. 596, Compilation of Acts of the Philippine Commission, 1908) embodied provisions for the designation of depositaries of public funds of the Philippine Islands, in all respects substantially like those contained in the now existing Philippine law (Sec. 625, Revised Administrative Code of the Philippine Islands, 1917) as follows:

> The Governor-General may appoint any bank or banking institution in the Philippine Islands, and the Secretary of War any similar institution in the United States, as a depositary of the Government of the Philippine Islands, after such institution has filed sufficient evidence of its sound financial condition and has deposited, as security, either in the Insular Treasury or in the Bureau of Insular Affairs, at Washington, bonds of the United States or of the Government of the Philippine Islands or other bonds or securities satisfactory to and approved by the officer making the appointment and in such amount as shall be required by him.

Other pertinent provisions of the Revised Administrative Code of 1917, found in Sections 1603-1605, 1622, 1623, 1625 and 1626, are quoted in Appendix II, *infra*, pp. 11-14.

The Revised Administrative Code of 1917, as enacted by the Philippine Legislature in its Act No. 2711, containing the section above quoted, as well as the other provisions cited, was submitted to the Congress by the President as an inclosure to his letter dated December 7, 1917. It may fairly be presumed that insular Act No. 1792 of October 12, 1907,

supra, wherein these provisions were in substance originally enacted, was similarly reported to the Congress, as required by Sec. 86 of the Act of July 1, 1902, *supra*. The Congress has never altered, amended or modified the said Revised Administrative Code in any respect and those provisions thereof above mentioned continue to constitute the insular law governing the conduct of the War Department and the Philippine Government with relation to the designation and employment of depositaries of public funds of that Government.

Under and pursuant to the above mentioned provisions of the Insular Administrative Code, the Secretary of War has from time to time designated certain state and national banks within the continental limits of the United States as depositaries for funds of the Philippine Government and people, the Governor-General of the Philippine Islands has designated the same banks as branches of the insular Treasury, and the Treasurer of the Philippine Islands has placed and kept on deposit therein large amounts of the public funds of the People of the Philippine Islands, for the purpose of maintaining the parity of Philippine bonds, notes, coinage and currency. As above stated the total amount of such deposits in the United States now approximates $63,000,000, and these deposits are distributed among 34 national banks and 13 state banks.

As prescribed by the same laws each depositary bank has been required to deposit, and has deposited, with or to the order of the Chief of the Bureau of Insular Affairs, War Department, collateral security of a value equivalent to the amount of the deposit, in each instance under a formal pledge agreement in writing, authorizing recourse by the pledgee to the pledged collateral in the event of a failure to repay the amount of the deposit.

This practice has been followed uniformly since about the year 1908, during all of which period the national banks so employed as depositaries have been periodically examined by the official representatives of the Comptroller of the Cur-

rency, as required by law, without any objection to the practice having been made by that executive.

Meanwhile, as the undersigned are informed and believe, substantially the same practice has for a long time been followed very generally by both national and state banks throughout the United States, with relation to other deposits of public funds, and perhaps a majority of such banks are now carrying such deposits, secured by pledges of collateral, where there is no express statutory authority for such security, believing that their general statutory powers imply incidental power to make such pledges.

ARGUMENT

Thus it appears that for a period of about twenty-five years Philippine statutes have expressly authorized and required the practice of taking pledges of collateral to secure deposits of public funds of the Philippine Islands made in both state and national banks within the United States. It further appears that those insular statutes, soon after their original enactment, were officially reported to the Congress, and that the Congress has never seen fit to exercise its expressly reserved right to repeal or amend them.

Meanwhile the Comptroller of the Currency, who is the official directly charged with the administration of the national banking laws, has uniformly held that national banks are legally empowered to pledge their assets to secure deposits of public funds (Petition, pp. 11, 23), and, although necessarily aware of the practice above described, has allowed it to continue with his tacit approval.

We conclude, as far as national banks are concerned, that the practice prescribed by the insular statutes has always had the tacit approval of both the Congress and the executive department immediately charged with administration of the national banking laws. In short, the national banking laws for nearly a generation have been tacitly construed by both the legislative and executive branches of the Government, to per-

mit that practice, and therefore to confer upon national banks implied power to pledge assets for the security of deposits of public funds. Only the clearest evidence of a contrary intent, deducible from the pertinent statutes, would justify the courts in disturbing that construction. We have been unable to discern any such evidence.

CONCLUSION

Other phases of the case have been ably covered in the petition and supporting brief, and in the well reasoned dissenting opinion of JUDGE ALSCHULER of the Circuit Court of Appeals. An opinion of the United States Circuit Court of Appeals for the Tenth Circuit, rendered August 12, 1933, dealing with issues somewhat similar to those here involved, is quoted for the convenience of the Court in Appendix III, *infra*, pp. 15-21.

The writ should be granted and the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX I

TREASURY DEPARTMENT
WASHINGTON

Comptroller of the Currency

August 21, 1933.

The Honorable,
The Secretary of War.

Sir:

Receipt is acknowledged of your letter of August 16th discussing the interest of the War Department, as custodian of Philippine Government funds, in the recent decision of the United States Circuit Court of Appeals, Seventh Circuit in the case of *Sneeden, Receiver of the City National Bank of Herrin, Illinois* v. *City of Marion, Illinois,* reported in 64 Fed. (2nd) 721. Counsel for the City of Marion is preparing to file a petition for writ of certiorari in this case in the Supreme Court of the United States and the Philippine Government has authorized officers of the Judge Advocate General's Office of the War Department to appear in its behalf, as *amicus curiae,* in support of the petition. You ask whether the Comptroller of the Currency, the Receiver or his counsel will have any objection to such appearance.

The Comptroller of the Currency in his capacity as trustee for the general creditors of the City National Bank of Herrin directed his agent, the Receiver, to file this action in the United States District Court and to take an appeal to the United States Circuit Court of Appeals. The Comptroller, in his capacity as trustee for the creditors of this particular bank, the Receiver and his counsel are content to accept as final the decision of the United States Circuit Court of Appeals, favorable to the general creditors. However, the Comptroller of the Currency, in charge of the affairs of more than 2,000 closed National banks, is very desirous of having the law concerning the power of National banks to pledge assets for public deposits definitely settled by the Supreme Court of

the United States. Accordingly, neither the Comptroller of the Currency nor his agent, the Receiver, nor the Receiver's counsel have any objection to representatives of the Philippine Government or the War Department appearing in this case as amicus curiae.

The Receiver of the City National Bank of Herrin, is being instructed today to accept the decision of the United States Circuit Court of Appeals as final and to instruct his counsel not to file a brief in the United States Supreme Court against the petition for writ of certiorari. Of course if certiorari is granted counsel for the Receiver will appear on the merits. This office will be pleased to cooperate in this matter with the representatives of the Judge Advocate General's Office concerned, to the fullest extent possible under the circumstances.

Yours very truly,

(Signed) J. F. T. O'CONNOR,

Comptroller of the Currency.

APPENDIX II

Extracts from the Revised Administrative Code of the Philippine Islands

(Act No. 2711, approved March 10, 1917)

Sec. 625 (*supra*, p. 4).

Sec. 1603 (as amended by Act No. 3519, Feb. 20, 1929).

Functions of Bureau of Treasury.—The Bureau of the Treasury shall be charged with the safekeeping of governmental funds, the supervision of the currency, and generally with the administration of the laws of the United States and of the Philippine Islands relating to coinage and currency in said Islands, and any other laws or parts of laws that may be expressly placed within its jurisdiction.

Sec. 1604. *Treasurer as custodian of governmental funds.*—The Insular Treasurer shall receive for safekeeping all funds which by law may be covered into the Insular Treasury or deposited therein, whether revenues and receipts of the Government or trust and depositary funds either of the Government of the Philippine Islands or of the United States. He shall likewise receive special deposits of money or securities from individuals in connection with or relating to governmental transactions.

Sec. 1605. *Branches of Philippine Treasury in United States.*—The Governor-General may in his discretion designate such depositaries of the Philippine Government in the United States as he may deem advisable to be branches of the Philippine Treasury.

* * * * * * * * * *

ARTICLE VI.—*"Gold Standard Fund".*

Sec. 1622. *How constituted.*—There is hereby constituted in the Insular Treasury a separate and trust fund, designated as the "Gold Standard Fund", which shall at all times be maintained in a sum not less than fifteen per centum of the money of the Government of the Philippine Islands in circu-

lation and available for circulation, including both coin and Treasury certificates. If at any time and for any reason said fund shall fall below the minimum hereinabove fixed, the deficiency shall be made up out of any funds then in the Insular Treasury or thereafter paid into the Treasury, not specifically appropriated to meet the payment of the principal, sinking fund, or interest of the public debt, and such amount shall be considered as automatically appropriated for this purpose, and the Insular Treasurer is hereby authorized and directed to transfer the necessary amount to the "Gold Standard Fund" to make good any such deficiency therein.

* * * * * * * * * *

Such fund shall not be used to pay any of the expenses of the Government of the Philippine Islands or to satisfy any of the appropriations of said Government except only such expenses as follows:

(*a*) Those connected with the purchase of bullion, the coinage of the same into money of the Philippine Islands, and those expenses which are incidental to such coinage;

(*b*) Those connected with the putting of the money into circulation, including the prepartion, issue, and destruction of treasury certificates, and including additional compensation to the members of the committee provided for in section sixteen hundred and twenty-five, paragraph (*g*) of this Act;

(*c*) Those connected with the carrying on of such transactions, by exchange or otherwise, as may be authorized by law to maintain the circulation of the currency of the Philippine Islands, and to maintain the parity of value between the gold standard peso and Philippine silver peso and subsidiary and minor coins.

Sec. 1623. *How held.*—The "Gold Standard Fund" shall be held in the vaults of the Insular Treasury in Manila or may in part be held in the form of deposits with such Federal Reserve Banks or member banks of the Federal Reserve System in the United States as may be designated from time to

time by the Governor-General to be branches of the Philippine Treasury for receiving such deposits: * * *.

Philippine silver coin in the "Gold Standard Fund" may at any time be exchanged by the Insular Treasurer for an equivalent amount, at par of gold on deposit in the United States in the "Treasury Certificate Fund."

* * * * * * * * * *

ARTICLE VII.—*Issuance of treasury certificates and maintenance of fund to protect the same.*

Sec. 1625. *Manner in which treasury certificates are to be dealt with.* * * *

Sec. 1626. *Issuance of treasury certificates.*—The Treasurer of the Philippine Islnads is hereby authorized, in his discretion, to receive at the Insular Treasury or at any of its branches, deposits of silver pesos or half pesos authorized herein, in sums of not less than twenty pesos, and to issue therefor treasury certificates of an equivalent face amount, in denominations of not less than one peso, nor more than five hundred pesos. Coin so received shall be retained in the Treasury and held for the payment of such certificates, on demand, and used for no other purpose, and shall constitute a separate and trust fund in the Insular Treasury, to be known as the "Treasury Certificate Fund."

The "Treasury Certificate Fund" shall at all times be equivalent in amount to one hundred per centum of all treasury certificates in circulation and available for circulation, and shall be constituted of silver coins received in exchange for the treasury certificates, and shall be held in the vaults of the Insular Treasury in Manila, and not elsewhere: *Provided, however,* That when the Government's supply of silver coin is insufficient to meet the demands of trade, gold coin of the United States may be substituted temporarily for silver pesos in the fund to such an extent as may be found necessary to release silver coins for circulation, pending the purchase of silver bullion for the coinage of silver coins, which silver coins

shall immediately be substituted for the gold placed in the fund: *And provided, further,* That as first set up and established by the provisions of this Act and until such time as the Governor-General in writing may direct the purchase of silver bullion for the coinage of additional silver coins, the "Treasury Certificate Fund" instead of being constituted wholly of silver coins held in the vaults of the Insular Treasury in Manila, may be constituted in part of currency issued by and or under the authority of the United States held in Manila and on deposit with such Federal Reserve Banks or member banks of the Federal Reserve System in the United States as may from time to time be designated by the Governor-General to be branches of the Philippine Treasury for receiving such deposits.

* * * * * * * * * *

APPENDIX III

United States Circuit Court of Appeals

TENTH CIRCUIT

No. 809

APRIL TERM, 1933

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and JAMES W. WORRALL,

Appellants,

v.

F. L. KOKRDA, *as Receiver of the First National Bank of Deer Trail,*

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

(August 12, 1933)

L. Ward Bannister (Thos. A. Mapes and Samuel M. January were with him on the brief) for appellants.
Archibald A. Lee for appellee.

Before PHILLIPS and MCDERMOTT, Circuit Judges, and KENNEDY, District Judge.

PHILLIPS, Circuit Judge, delivered the opinion of the court.

Worrall was the duly elected and qualified treasurer of Elbert County, Colorado, for the term beginning January 1, 1931, and ending January 1, 1933. The Fidelity & Deposit

Company, hereinafter called the surety company, was the surety on his official bond. On January 9, 1931, the surety company and the First National Bank of Deer Trail entered into a contract of pledge, the material portions of which are set out in Note 1.

On October 13, 1931, Kokrda was duly appointed receiver of the bank by the Comptroller of the Currency. Thereafter such receiver brought this action and alleged that the bank was the owner of four federal land bank bonds of the face value of $1,000 each, and that on January 9, 1931, the surety company wrongfully took possession of such bonds and has since wrongfully and unlawfully detained them. He sought recovery of the bonds or their value, and damages for their unlawful detention.

The surety company filed an amended answer, and Worrall filed a petition in intervention in which they alleged: That Worrall was the treasurer of Elbert County; that the surety

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NOTE 1.

"Whereas, James W. Worrall, has been duly elected Treasurer of Elbert County in the State of Colorado, and as such Treasurer at the special instance and request of the First National Bank of Deer Trail, Colorado, and on the security hereinafter described, has deposited or may hereafter from time to time deposit certain moneys with the First National Bank of Deer Trail, Colorado, in regular course of business which deposits will be evidenced by demand certificates of deposit in customary form.

"And, Whereas, said First National Bank of Deer Trail, Colorado, has delivered to the Fidelity and Deposit Company of Maryland the following described bonds. . . . (Here follows a detailed description of the bonds involved herein.)

"Now, Therefore, if the First National Bank of Deer Trail shall promptly pay to the said James W. Worrall or his order, upon demand in regular course of business, all moneys which have been or shall hereafter be deposited with said First National Bank of Deer Trail as aforesaid, by or on behalf of the said James W. Worrall, County Treasurer; and shall keep and hold harmless the said James W. Worrall as well as the Fidelity and Deposit Company of Maryland as surety on James W. Worrall's official bond, of, and from all loss or damages which may arise or accrue to the said James W. Worrall or the Fidelity and Deposit Company by reason of the deposit or delivery of said funds, or any part thereof, . . . then this obligation to be void, otherwise to remain in full force and virtue.

"This receipt is issued in duplicate, the duplicate to be held by the Fidelity and Deposit Company of Maryland, as security on the official bond of James W. Worrall, Treasurer of Elbert County and the original to be held by the First National Bank of Deer Trail . . . ."

company was surety on Worrall's official bond; that Worrall, during his term of office, kept certain public moneys on deposit in the bank, and in order to protect Worrall, and with the knowledge and consent of Worrall, the bank executed such contract of pledge and delivered the bonds to the surety company; that on October 13, 1931, the bank became insolvent and closed its doors; that on that date there was on deposit in the bank public funds of Elbert County in the sum of $3,764.88, together with accrued interest of $40.00; and that demand was made upon the bank and upon the receiver for the payment of such deposit, and the same refused.

The trial court sustained demurrers to the amended answer and petition in intervention. The surety company and Worrall elected not to plead further. The trial court rendered judgment in favor of the receiver for the return of the bonds and for damages.

The Act of June 25, 1930 (46 Stat. 809), Sec. 90, Title 12, U. S. C. A., in part reads as follows:

> "Any association may, upon the deposit with it of public money of any state or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited of the same kind as is authorized by the law of the state in which such association is located in the case of other banking institutions in the state."

Sec. 1, Chap. 83, Colo. S. L., 1927, provides that each county treasurer shall deposit all public funds coming into his possession "in one or more responsible banks located in . . . Colorado"; that before making such deposits the treasurer may take from said bank or banks a bond conditioned that such deposits shall be promptly paid on the check or draft of the treasurer; that such depository bank may give in lieu of such depository bond certain kinds of bonds or other interest-bearing securities including "farm loan bonds issued by any Federal bank or joint stock land bank, . . . to be held by such

treasurer as security for the prompt payment of such deposit or deposits"; that such bonds or securities given in lieu of a depository bond shall be deposited in the custody of some national bank in Colorado, or in a bank or trust company, doing business under the laws of Colorado, under an escrow agreement executed in triplicate by the treasurer, the depository bank, and the escrow holder, to the effect that such securities shall be held and safely kept by such escrow holder as security for the prompt payment of such deposits on the check or draft of the treasurer; and that one copy of such escrow agreement shall be kept by the depository bank, one by the county treasurer, and one by the escrow holder.

The contract of pledge in the instant case was not entered into between the bank and Worrall as treasurer, but it was entered into for his express benefit. The surety company was made the escrow agent, instead of a national bank located in Colorado, or a state bank or trust company. The contract was not entered into in triplicate, and a copy thereof was not delivered to the treasurer. Except as above indicated, the pledge of collateral security complied with Chap. 83, supra.

Counsel for the receiver contends that, since the pledge was not made in strict accord with Chap. 83, supra, it was unauthorized by the provisions of Sec. 90, supra, and that the receiver was entitled to recover such bonds without first accounting to the treausrer for the county moneys deposited with the bank.

Sec. 90, supra, does not say a national bank may give security in the same *manner*, but that it may give security of the same *kind* as a state bank may give. *Kind* means class; character, sort, description. Webster's New International Dictionary. Had Congress intended to limit the manner of giving the security, we think it would have said, "of the same kind and in the same manner", or used words of equivalent import. The plain purpose of the statute was to remove any doubt of the power of national banks to give security for public deposits, and in that respect to enable them to invite public

deposits on an equal footing with state banks. *Baltimore & O. R. Co.* v. *Smith* (C. C. A. 3) 56 F. (2d) 799, 802. It is our opinion that it authorizes a national bank to give the same kind of security for public deposits as state banks are authorized to give, in a state in which such national bank is situated, and leaves to state law the question of the procedure to be followed in the giving of such security. But if it authorizes a national bank to give security for public deposits only in compliance with the provisions of state law, the power existed to pledge the bonds, and the only question is, whether there was such a substantial compliance with Chap. 83, supra, as would bind the bank.

An examination of the cases relied on by counsel for the receiver has led us to the conclusion that many of them are distinguishable from, and do not control the instant case. For example: In *Sneeden* v. *City of Marion* (C. C. A. 7) 64 F. (2d) 721, the court said:

> "Section 316, c. 24, Smith-Hurd Rev. St. Ill. 1931, and paragraph 374, supra, expressly provides that before any Illinois bank may receive a deposit of public funds, of the kind herein described, it shall execute a bond with sureties approved by the president of the city council, as security for the return of the money deposited; and it is not authorized to give, nor is the treasurer authorized to accept, other security."

There, the bank was not authorized to secure the deposit by securities which it undertook to pledge for that purpose. It was authorized to secure the deposit only by a surety bond. Here, the bank was expressly authorized to pledge the bonds, but failed to do so in exact accord with the statute. In *Parks* v. *Knapp* (C. C. A. 8) 29 F. (2d) 547, the sureties on the depository bond undertook to hold the collateral pledged to protect themselves. Here, the appellants are undertaking to hold the pledged collateral to protect the county, for whose benefit the bank had express power to make the pledge. *Texas & P. R. Co.* v. *Pottorff* (C. C. A. 5) 63 F. (2d) 1, concerned a

private deposit, and a dictum therein, as we shall presently show, sustains the contention of appellants.

While there are decisions to the contrary, the rule supported by many well reasoned decisions is that where the legislature of a state has declared by express statutory enactment that deposits of public funds shall be secured, thereby indicating that the public policy of the state is not only to permit, but to require the securing of such deposits, contracts to secure such deposits, made in good faith, should be sustained, although not entered into in exact accord with the statutory requirements.

In *Texas & P. Ry. Co.* v. *Pottorff, supra,* the court said:

> "Cases, and these are supported, we think, by the better reasons, holding that, where the Legislature of a state has declared in specific statutes that deposits of public money must be secured this sufficiently indicates the public policy of the state towards the securing of public deposits, to sustain contracts whether in exact accordance with the statute or not, made in good faith for their security, are, *First Am. Bank & Trust Co.* v. *Palm Beach,* 96 Fla. 247, 117 So. 900, 67 A. L. R. 1398, 1400; *Melaven* v. *Hunker,* 35 N. M. 408, 299 P. 1075; *Cameron* v. *Christy,* 286 Pa. 405, 133 A. 551; *McFerson* v. *Nat. Surety Co.,* 72 Colo. 482, 212 P. 489; c/f Michie Banks & Banking, Vol. 4, p. 22, Sec. 19."

The treasurer deposited the public moneys in the bank. It was the duty of the bank to give security therefor in accordance with the provisions of Chap. 83, supra. This it undertook to do by pledging proper securities and depositing them with the surety company, instead of with an authorized bank. Under these circumstances we are of the opinion that the bank is bound by the pledge and cannot defeat it by setting up that it did not pledge the bonds in strict compliance with the statute. *Schornick* v. *Butler,* .... Ind. ...., 185 N. E. 111, 112; *Melaven* v. *Hunker,* 35 N. M. 408, 299 P. 1075; *Williams* v. *Earhart,* .... Ariz. ...., 273 P. 728.

Furthermore, the bank has not returned the deposit. When it received the deposit, it was its duty to secure the same in the manner provided in the statute. Under such circumstances it ought not to be permitted to recover the security without returning the deposit. *Schornick* v. *Butler, supra; State Bank of Commerce* v. *Stone,* 261 N. Y. 175, 184 N. E. 750, 754; *Melaven* v. *Hunker, supra.*

REVERSED and REMANDED with instructions to overrule the demurrers.

A true copy.

Attest:

ALBERT TREGO,

(SEAL)

Clerk U. S. Circuit Court of Appeals, Tenth Circuit.